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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. THEODORE ANTHONY QUEZADA, Defendant and Appellant.	H044717 (Santa Clara County Super. Ct. No. C1484428)

A jury found defendant Theodore Anthony Quezada guilty of assault with a deadly weapon other than a firearm (a knife) (Pen. Code § 245, subd. (a)(1))[1] (count 1) and attempted criminal threats (§§ 422, 664) (a lesser included offense of count 2).[2] The jury found true that defendant had personally used a deadly or dangerous weapon in committing the assault within the meaning of sections 667 and 1192.7. The trial court found the allegations of three prior strike convictions (§§ 667, subd. (b)-(i); 1170.12) and two prior serious felony convictions (§ 667, subd. (a)) to be true. The trial court

[1] All further references are to the Penal Code unless otherwise specified.

[2] In *People v. Toledo* (2001) 26 Cal.4th 221, the California Supreme Court recognized the crime of attempted criminal threats and indicated that such crime could be committed in a variety of ways, including where a defendant, "acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear." (*Id.* at p. 231.)

sentenced defendant to concurrent terms of 25 years to life under the Three Strikes law and two consecutive five-year enhancement terms as to each conviction.

On appeal, defendant argues that the trial court erred by (1) excluding his statements in violation of Evidence Code section 356 and his constitutional rights to present a defense and due process and (2) failing to exclude or sanitize his prior convictions in violation of Evidence Code section 352 and his constitutional rights to present a defense and due process. He maintains that the cumulative effect of the foregoing errors requires reversal on appeal. Defendant also contends that under the rule of *In re Estrada* (1965) 63 Cal. 2d 740 (*Estrada*), he is entitled to the benefit of the ameliorative changes to section 1385, which no longer bars a judge from exercising discretion to strike, in furtherance of justice, a prior serious felony conviction enhancement (§ 667, subd. (a)). He asserts that this case should be remanded to allow the trial court to exercise its discretion under section 1385, as amended effective January 1, 2019.

We reject defendant's claims of prejudicial error. But we agree that the trial court should be afforded the opportunity to exercise its discretion under the newly amended section 1385.

I

Evidence

In May of 2014, Luis N. was working in construction at a McDonald's near the border of San Jose and Santa Clara. Each morning, he got to work by a combination of taking the light rail and biking. He had had the construction job for less than a month.

Shortly after 6:00 a.m. on May 25, 2014, Luis boarded the northbound light rail train with his bike at Curtner Station. Surveillance videos of the light rail train, which were recorded that morning, were admitted into evidence at trial.

Luis placed his bike in a bike rack across from a row of seats, walked down the aisle, and sat down at the back of the train car. Luis was wearing a red shirt, black pants,

and a yellow backpack. Luis testified at trial that he had planned to get off at Civic Center Station and ride his bike to work from there.

At approximately 6:16 a.m. on May 25, 2014, defendant, who was talking on a cell phone and carrying a bottle, and Irene G., an unrelated passenger, boarded the same light rail train at Santa Clara Station. Defendant and Irene entered through different doors. Irene was taking the light rail to Metro/Airport Station, where she planned to take a bus to work, as she normally did. Irene had been taking that light rail route, a trip of 10 to 15 minutes, for two or two and a half years.

Irene had first noticed defendant at Santa Clara Station, where they were both sitting on benches and waiting for the train. She was seated less than five feet away from him. Defendant was on the phone, and he appeared to be under the influence of something. Defendant asked her for a dollar.

After boarding the light rail train, defendant, who was still talking on his cell phone, sat across the aisle from the bike rack, where Luis's bike was stored. Irene sat down about 15 to 23 feet away from defendant in a seat facing the aisle adjacent to the bike rack.

A few minutes later, after the stop at St. James Station, Luis got up from his seat, walked down the aisle, and stood in the area near the exit doors closest to the bike rack. Irene saw a man in a red shirt, later determined to be Luis, standing on the train. Luis conversed with and fist-bumped another man, who was standing with his bike in the same area. The train briefly stopped at the Japantown/Ayer Station and then continued. Luis continued to chat with the other passenger, and they fist-bumped again.

After Civic Center Station was announced as the next station, Luis approached the bike rack. As the train was reaching that stop, Luis first encountered defendant and asked him to move so that he could grab his bike. The first two times Luis asked defendant to move, Luis did so "nicely," politely, and "with respect." Defendant was still talking on his cell phone and said, "Hold on," and "scooted a little to the side."

Irene saw Luis trying to reach and take down his bike. She heard him say to the defendant, "Excuse me. I need to get my bike down. I am getting off at the next stop." It appeared to her that defendant was ignoring Luis and continuing his phone call. Defendant stood, but he did not move out of the way. Luis was afraid that he would miss his stop and be late for work.

By the third time Luis asked him to move, Luis was feeling upset. Luis asked defendant to move in a more authoritative voice. As he stood up, defendant told Luis, "Don't tell me what to do, punk." Luis said, "Move. Hurry up," and "Now!"

At trial Luis recalled cussing and telling defendant to " 'get out of the f'ing way.' " Luis described defendant's attitude as "cocky." Irene similarly testified that defendant "had attitude."

Luis took his bike off the rack. Luis said, "Move, dude." Luis again commanded defendant to move, and defendant moved into the area by the exit doors. Luis put down the bike's kickstand, left the bike standing in the aisle, and approached defendant.

Although their conversation is mostly indecipherable on the surveillance video, Luis appears to be berating defendant. Luis said, "Don't be an idiot, bro." At trial, Luis acknowledged that he made a few threats against defendant at some point. Defendant, who seemed angry and agitated to Luis, threatened to kill Luis and slice his throat. Luis, who was angry, recalled saying something like, " 'Don't make me take my belt off and wh[u]p your a-s-s.' " Luis "smelled liquor in the air" in defendant's vicinity. Although he was shocked at the threat and thought it was possible that defendant would carry it out, Luis did not take it as seriously after he smelled the alcohol. Luis said something like, "In the name of Jesus, praise God, bro," to diffuse the situation and began to back off. Luis indicated that he did not feel threatened at that point.

Defendant said, "Don't hide behind God," and mumbled threats. Luis turned back, got in defendant's face, and said, "What's up?" They exchanged more words.

Luis was feeling angry and upset with defendant because he had missed his stop and would not get to work on time. Luis retrieved his bike from the aisle and moved back into the area by the exit doors, where defendant was standing. Luis and defendant continued to exchange words. Luis had his back to defendant at one point, but Luis did not feel scared or threatened at that moment.

As the train continued, Luis was standing near the exit doors, as was defendant. Luis pressed the button to request a stop at Gish Station, but he did not exit at the Gish Station. Luis thought that he would be able catch a bus at Metro/Airport Station, a stop after Gish Station and that the bus would stop directly across the street from the McDonald's where he was then working. At the Gish Station stop, Luis repositioned his bike so that he was facing toward the exit doors and holding his bike upright between defendant and himself.

Both Luis and defendant exited the light rail train at Metro/Airport Station, shortly before 6:30 a.m. Luis got off first, and defendant followed him out the same exit doors. After Luis stepped off the train with his bike, Luis was struck on the cheek from the right side. Luis did not see who struck him. Luis turned around, saw defendant, and began wrestling with him.

Irene also exited the light rail at Metro/Airport Station. As Irene was walking away, she saw Luis "situating his stuff on his bike." Irene turned around when she heard a commotion, and she saw defendant and Luis fighting. At trial she recalled seeing defendant lunge and swing at Luis. She never saw Luis throw a punch or hit defendant.

Luis was trying to take defendant down to the ground and restrain him. After Luis managed to get defendant on the ground and hold him there, Luis realized that blood was dripping from his cheek where he had been struck. Luis also noticed a closed folding knife in defendant's hand.

Irene saw Luis get on top of defendant and hold him down. Irene saw a lot of blood coming out of Luis's face. Luis asked her to call the police, and Irene called 911. Irene was scared.

A recording of the 911 call was played for the jury. On the 911 recording, a male voice could be heard in the background yelling, "Call the police." Irene said, "They're coming; they're coming." A male could be heard yelling, "There's a cut on my face, see." Irene said, "Yeah." The dispatcher said, "Ma'am," and instructed, "Continue to listen to my questions." A male could be heard on the recording repeatedly yelling, "Don't move" or "Don't fucking move."

Officers arrived at the scene. It was Irene's recollection that when the officers arrived, they told defendant to drop the knife, and an officer kicked the knife out of defendant's hand.

At trial, Luis admitted to having some criminal convictions, including a 2014 misdemeanor conviction for "auto theft," a 2013 misdemeanor conviction for petty theft, a 2005 felony conviction for drug sales, and a 1999 felony conviction for "auto theft." Irene testified that she had a felony conviction for transportation for sale of drugs and a 2002 misdemeanor conviction for petty theft.

On May 25, 2014, Chris Tolbertson, a deputy sheriff with the Santa Clara County Sheriff's Office, was assigned to the transit patrol division, and he was patrolling the light rail operated by the Valley Transportation Authority (VTA). The deputy was dispatched to the VTA Metro Station north on the report of a physical fight in progress.

When he arrived, Deputy Tolbertson saw two handcuffed individuals, both of whom were injured. Luis had a cut on the right side of his cheek. Defendant had cuts and scrapes on his hands and forearms, several cuts on his face, including a cut on his nose that was bleeding a little bit, and his forehead was swollen. Luis gave a statement to Deputy Tolberson.

Luis was treated at Santa Clara County Valley Medical Center that same day. His medical records showed that he had suffered a puncture wound to his right cheek, which was two centimeters long and one centimeter deep and required six stiches to close.

Deputy Tolbertson found a closed knife lying on the station platform, collected it as evidence, and photographed it. The knife was approximately four inches long. Based on his training and experience, the deputy opined that Luis's cheek injury was "roughly consistent with the size" of the knife. Based on his training and experience, the deputy opined at trial that the substance seen on the knife's blade and handle in a photograph was blood.

Deputy Tolbertson took photographs of defendant at the hospital. The deputy spoke to defendant after advising him of his rights. Defendant exhibited signs that he had been drinking alcohol, and he appeared to be under the influence of alcohol. His speech was "somewhat slurred," and he was talkative.

Deputy Tolbertson testified that when he asked defendant after the incident what was going through his head during the incident, defendant said that "he was not going to play with [Luis]" but "was going to kill him." The deputy asked defendant about his alleged threats to kill Luis and slice his throat. Defendant told the deputy something like, "Hell yeah, I was serious. Don't mess with me."

II

Discussion

A. *Exclusion of Two Statements Made by Defendant to Deputy After the Incident*

1. *Background*

As indicated, some of defendant's hearsay statements were conveyed on direct examination of Deputy Tolbertson. On cross-examination, the defense sought to introduce another hearsay statement of defendant's intent to defend himself, which had been made by defendant during the same interview, pursuant to Evidence Code

section 356. After the prosecutor objected on hearsay grounds, a discussion was held on the record out of the jury's presence.

The parties and the court discussed the hearsay statements that defendant had made during his interview with Deputy Tolbertson, and the trial court ruled on the several statements that the defense wished to introduce. Defendant's full statement, a part of which had been elicited on direct examination of the deputy, was as follows: "To be honest, my thought of mind went back to prison mentality. I was not going to play with [Luis]. I was going to kill him." When the deputy had asked defendant about his intent during the incident, defendant had said, "To defend myself." When the deputy had asked defendant why he threatened to kill Luis, defendant had said that he thought he was going to get attacked. The deputy had asked about defendant's intent when he "punched" Luis in the face. Defendant had responded, "My intent was to back him off and give him a wake-up call."

The trial court ruled that the statement regarding defendant's intent to defend himself was admissible under Evidence Code section 356. It ruled that defendant's statement that he threatened to kill Luis because he thought he was going to get attacked was inadmissible under Evidence Code section 352 because self-defense was not a defense to the crime of making a criminal threat (§ 422) and the statement would mislead the jury.[3] The court also indicated that the second statement did not put anything "heard already" "into context." As to defendant's third statement explaining why he punched Luis in the face, the trial court ruled that it was inadmissible because it did not explain or put into context any admitted statement.

[3] Under Evidence Code section 352, a trial court has discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Finally, the trial court ruled that evidence of certain prior convictions, which were previously ruled admissible in the event defendant testified, would be admissible to impeach defendant if he sought to introduce his hearsay statement of his intent to defend himself. Defense counsel did not seek to elicit that statement from the deputy at trial.

2. *Analysis*

Defendant argues that the trial court erred by failing to admit all three of his out-of-court statements. He claims that the court's rulings violated Evidence Code section 356 and his federal constitutional rights under the Sixth and Fourteenth Amendments since those three statements related to his defense.

The People maintain that there was no error as to defendant's out-of-court statement of his intent to defend himself because the trial court ruled it admissible. Further, citing *People v. Collins* (1986) 42 Cal.3d 378 (*Collins*), the People contend that defendant may not claim error because it was his "choice not to introduce th[at] statement."

Collins held that a defendant must testify at trial to preserve a claim that the trial court erred in ruling that a prior conviction was admissible for impeachment. (*Collins, supra,* 42 Cal.3d at pp. 383-388) The reasons for that holding were threefold: (1) "an appellate court cannot review [the trial's court's] balancing process [under Evidence Code section 352 regarding evidence of a prior conviction] unless the record discloses 'the precise nature of the defendant's testimony' " (*id.* at p. 384); (2) "when the defendant does not testify, the reviewing court . . . has no way of knowing whether the prosecution would in fact have used the prior conviction to impeach" (*ibid.*); and (3) "the reviewing court cannot intelligently weigh the prejudicial effect of that error if the defendant did not testify." (*Ibid.*).

Collins does not pertain to the trial court's threshold rulings regarding the *admissibility* of each of the proffered out-of-court statements or appellate review of those rulings. Defendant is not challenging the trial court's ruling that his statement of intent to

defend himself was admissible. Defendant's claims of error with respect to the trial court's adverse rulings on his hearsay statements are preserved for review insofar as he explicitly raises them on appeal.

The People argue that the trial court properly excluded defendant's second statement—that he threatened to kill Luis because he thought that Luis was going to attack him—under Evidence Code section 352 because the statement could mislead "the jury to believe that fear of an attack justified the uttering of threats." They further assert that the trial court properly excluded the third statement—that defendant's intent in punching Luis was "to back him off and give him a wake-up call"—under Evidence Code section 356 because the statement did not provide context for, or shed light on, his statements that were admitted into evidence or ruled admissible. Lastly, the People maintain that any error in excluding the second and third statements did not implicate defendant's constitutional right to present a defense and was harmless under our state's *Watson* standard of review (see *People v. Watson* (1956) 46 C.2d 818 (*Watson*)).

Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole *on the same subject* may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Italics added.) "The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) "Statements pertaining to other matters may be excluded.

(*People v. Williams* (1975) 13 Cal.3d 559, 565.)" (*People v. Samuels* (2005) 36 Cal.4th 96, 130.)

"In applying Evidence Code section 356[,] the courts do not draw narrow lines around the exact *subject of inquiry*." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174, italics added.) A "jury is entitled to know the context in which the statements on direct examination were made. (*People v. Sanders* (1995) 11 Cal.4th 475, 520 [where defense counsel elicited portions of investigative interview with witness, prosecution not foreclosed from inquiring into context of statements on redirect examination of witness and cross-examination of investigator].)" (*People v. Harris* (2005) 37 Cal.4th 310, 335.)

But "[t]he rule stated in [Evidence Code s]ection 356 . . . only makes admissible such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence. See, e.g., *Witt v. Jackson*, 57 Cal.2d 57, 67 (1961) (the rule 'is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced')." (Assem. Com. on Judiciary com., 29B pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 356, p. 650.) Evidence Code section 356 "permits introduction only of statements 'on the same subject' *or* which are necessary for understanding of the statements already introduced." (*People v. Breaux* (1991) 1 Cal.4th 281, 302, italics added.)

A trial court exercises its discretion when ruling on the admissibility of evidence under Evidence Code sections 352 and 356, and we review such rulings for abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 663 (*Fuiava*); see *People v. Thompson* (2016) 1 Cal.5th 1043, 1120.) A trial court's evidentiary rulings will not be overturned in the absence of a clear abuse of discretion. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*).)

Defendant argues that the second statement to Deputy Tolbertson—that he had threatened to kill Luis because he had anticipated a possible attack by Luis—indicated

that "early in the confrontation" with Luis, defendant "was already concerned [that] he was going to be attacked" and that the statement "most certainly has bearing on [his] intent as the confrontation continued and escolated [*sic*]." Even assuming the defendant's second out-of-court statement was admissible under Evidence Code section 356 because it related to the same subject (defendant's state of mind or intent during the incident), the trial court ruled that the statement was inadmissible pursuant to Evidence Code section 352. Since defendant has not challenged that decision on appeal, he has forfeited any claim of error with respect to that ruling. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).) Thus, any error in the court's ruling under Evidence Code section 356 was necessarily harmless in that the evidence was also excluded on a separate evidentiary ground, which is not being challenged on appeal.

Defendant argues that the third statement—that his "intent [in striking Luis] was to back him off and give him a wake-up call"—had some "bearing on this thought process and or/intent during the incident." Even if we assume arguendo that the trial court should have ruled the statement admissible under Evidence Code section 356 because it related to the same subject, defendant has failed to establish that the error was prejudicial under state law. Without any legal analysis or citation of authorities, defendant declares that "under any standard [of review], [he] was prejudiced by the exclusion of [his] statements." Any claim that the trial court's adverse rulings pursuant to Evidence Code section 356 were prejudicial under state law was forfeited by defendant's failure to provide any meaningful legal argument on appeal.[4] (See *Stanley*, *supra*, 10 Cal.4th at p. 793.)

[4] Furthermore, in light of the strong evidence of the crimes charged, there was no reasonable probability that the jury would have reached a more favorable result had all three of defendant's hearsay statements been admitted as requested. The evidence showed that their confrontation on the train had de-escalated, that in the minutes before arriving at Metro/Airport Station they were both calmly waiting by the exit doors, and that defendant attacked Luis unawares at Metro Station after they had disembarked.

Defendant nevertheless suggests that the trial court's failure to rule that all three statements were admissible violated his constitutional rights to present a defense and due process. Even assuming arguendo that such argument was preserved despite no such argument below, we reject it.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 (*Chambers*).) "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the [United States] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.] . . . [A]n essential component of procedural fairness is an opportunity to be heard. [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Citing *Chambers*, defendant claims that "[w]here the trial court improperly excludes defense evidence reversal is required." Chambers was convicted of murdering a policeman, even though another man had signed a written confession to the murder and orally confessed to the murder to several people. (*Chambers*, *supra*, 410 U.S. at pp. 285, 287-288, 292-293.) Mississippi did not recognize a hearsay "exception for declarations [that were] against the penal interest of [a] declarant. [Citation.]" (*Id*. at p. 299.) "As a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule [that barred a party from impeaching his own witness, even if adverse] and its hearsay rule, [Chambers] was unable either to cross-examine [the adverse witness whom he called at trial] or to present witnesses in his own behalf who would have discredited [the adverse witness's] repudiation and demonstrated his complicity." (*Id*. at p. 294; see *id*. at p. 295.)

Any error in not ruling them admissible was harmless under state law. (See *Watson*, *supra*, 46 Cal.2d at p. 836; Cal. Const., art. VI, § 13.)

In *Chambers*, the United States Supreme Court concluded that "the exclusion of . . . critical [hearsay] evidence, [of an adverse witness's confessions of murder], coupled with the State's refusal to permit Chambers to cross-examine [the adverse witness], denied him a trial in accord with traditional and fundamental standards of due process." (*Chambers*, *supra*, 410 U.S. at p. 302.) The United States Supreme Court subsequently observed: "*Chambers* was an exercise in highly case-specific error correction. . . . [T]he holding of *Chambers*—if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53.)

No errors comparable to the errors in *Chambers* have occurred in this case. *Chambers* "does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." (*United States v. Scheffer* (1998) 523 U.S. 303, 316 (*Scheffer*).) *Chambers* recognized that, generally, "as is required of the State, [the defendant] must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers*, *supra*, 410 U.S. at p. 302.) "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' [Citations.]" (*Scheffer*, *supra*, at p. 308.)

Defendant asserts that his three out-of-court statements sought to be admitted under Evidence Code section 356 were "directly related to [his] contention that he struck [Luis] in self-defense" and that the trial court's determination that only one statement out of the three was admissible violated his federal constitutional rights. However, he is not arguing now, and he did not argue below, and that self-defense may justify a criminal

threat. Rather, defendant argues that those statements were relevant to his defense to the criminal threat charge in that they suggested that his threat on the train was conditional. Defendant maintains that admission of "only portions of [his hearsay] statements was misleading as to [his] intent" because the jury was "left . . . with the impression that [he] had admitted to possessing . . . the requisite intent [for the charged offenses]" even though he had acted "with the intended purpose of defending himself."

As to the criminal threats charge, defendant specifically argues that his "threat was conditional upon [Luis] leaving [him] alone." "[T]he reference to an 'unconditional' threat in section 422 is not absolute."[5] (*People v. Bolin* (1998) 18 Cal.4th 297, 339.) "[I]mposing an 'unconditional' requirement ignores the statutory qualification that the threat must be '*so* . . . unconditional . . . *as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution* . . . .' (§ 422, italics added.)" (*Id*. at pp. 339-340.) " 'Language creating an apparent condition cannot save the threatener from conviction when the condition is illusory, given the reality of the circumstances surrounding the threat. . . . .' [Citation.]"[6] (*Id*. at p. 340.)

There was no evidence that defendant's verbal threat, as conveyed to Luis, was conditioned upon Luis's failing to leave defendant alone. To the contrary, the evidence of the words used by defendant in the surrounding circumstances were sufficient for the

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[5] Under section 422, subdivision (a), "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, *unconditional*, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety" (italics added) is guilty of the crime of making a criminal threat.

[6] In this case, the jury was instructed that "[i]n deciding whether a threat was sufficiently, clear, immediate, unconditional and specific, consider the words themselves, as well as the surrounding circumstances."

jury to find that they conveyed to Luis "a gravity of purpose and an immediate prospect of execution." (§ 422, subd. (a).) Here, neither of defendant's out-of-court statements that the court ruled inadmissible tended to establish that the *language* actually used by defendant to threaten Luis was conditional. (See Evid. Code, § 210; see also Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) The exclusion of irrelevant evidence does not deprive a defendant of his right to present a defense. (See *People v. Thornton* (2007) 41 Cal.4th 391, 445.)

In addition, defendant has not shown that his out-of-court statements that were ruled inadmissible were " 'so vital to the defense [of self defense] that due process principles required [their] admission.' [Citation.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 996; cf. *People v. Minifie* (1996) 13 Cal.4th 1055, 1070 (*Minifie*) [concluding that the court erred in excluding evidence of third party threats that went to the " 'heart of' " defendant's claim of self-defense and would not have required an undue consumption of time].) "Although completely excluding evidence of an accused's defense theoretically could rise to [the level of an unconstitutional deprivation of the right to present a defense], excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103 (*Fudge*).)

At trial, defense counsel argued that defendant reasonably believed that he was going to suffer bodily harm, his immediate use of force was necessary to defend against the danger, and defendant "used no more force than reasonably necessary to defend against that danger." The trial court's evidentiary rulings resulting in the exclusion of two of the proffered out-of-court statements did not impair this defense.

"[A]ssault with a deadly weapon is a general intent crime . . . ." (*People v. Perez* (2018) 4 Cal.5th 1055, 1066.) "[T]he required mens rea is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." [Citation.]" (*Ibid.*)

" 'To justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]' [Citations.]" (*Minifie, supra,* 13 Cal.4th at pp. 1064-1065.) "The right of self-defense ceases to exist when there is no longer any apparent danger of further violence on the part of an assailant." (*People v. Crandell* (1988) 46 Cal.3d 833, 873, abrogated on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; see CALCRIM No. 3474 ["The right to use force in (self-defense/[or] defense of another) continues only as long as the danger exists or reasonably appears to exist"].) A defense of imperfect self-defense is unavailable in a case of assault. (See *Minifie, supra,* at p. 1069.)

Under the trial court's rulings, defendant could have introduced his out-of-court statement that his intent was to defend himself. Defendant's two other out-of-court statements concerning his subjective state of mind did not go to the heart of his claim of self-defense. Defendant's explanation for making a criminal threat against Luis on the train had little tendency in reason to support his claim that his later assault off the train was justified as an act of self defense. The exclusion of defendant's statement of his intent "to back him off and give him a wake-up call" did not impair defendant's right to present a defense because this statement was ambiguous and the court had already ruled that his hearsay statement of intent to defend himself was admissible.

In sum, defendant has not demonstrated that the trial court's evidentiary rulings excluding the two out-of-court statements to Deputy Tolbertson violated his constitutional right to present a complete defense or otherwise violated due process. Even assuming arguendo that the rulings constituted state law error, the *Chapman* standard of review does not apply. (See *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to

declare a belief that it was harmless beyond a reasonable doubt"]; *Fudge*, *supra*, 7 Cal.4th at p. 1103.) The United States Supreme Court has "long recognized that a 'mere error of state law' is not a denial of due process. *Gryger v. Burke*, 334 U.S. 728, 731 1948)." (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21.) "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' [Citations.]" (*Ibid.*; see *Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) "The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.' [Citation.]" (*Rivera v. Illinois* (2009) 556 U.S. 148, 158.)

B. *Evidence of Prior Convictions*

1. *Background*

The defense's in limine motion sought a ruling allowing the impeachment of Luis with three prior convictions—namely, a 2005 conviction of possession for sale (Health & Saf. Code, § 11378), a 1999 conviction of unauthorized use of a vehicle (Veh. Code, § 10851), and a 1999 conviction of assault with intent to commit rape (§ 220). The trial court granted the motion but indicated that the 1999 sexual assault conviction would be sanitized as a conviction of a felony offense involving moral turpitude.

The following day, the trial court ruled that if defendant testified at trial, the prosecution could use three of his convictions to impeach him, specifically, a 2011 misdemeanor conviction of vandalism, a 2004 felony conviction of making a criminal threat, and a 1986 felony conviction of attempted murder. The court indicated that, under Evidence Code section 352, it had "balanced" the prejudicial nature of the prior convictions against their probative value. It ruled that defendant's remaining convictions would be excluded as "remote," "overly cumulative and prejudicial." The prior convictions impliedly ruled inadmissible included a 1986 felony conviction of violating former section 261, subdivision (2) (now subd. (a)(2)) (forcible rape) and two 1984 felony convictions for violating former section 245, subdivision (a)(1) (aggravated

assault). The court noted that it would have sanitized the prior conviction of a sexual offense *if* the conviction had been ruled admissible. The court denied the request to "sanitize" any of the convictions that it had ruled admissible for impeachment.

The court and the parties then revisited the issue of impeachment of Luis with his prior convictions. Defense counsel indicated that he wished to use four additional convictions to impeach Luis: (1) a conviction of violating section 422 (making a criminal threat); (2) a conviction of petty theft; (3) a misdemeanor conviction of "grand theft auto with priors," and (4) a misdemeanor conviction of violating section 148. The trial court recognized that Luis's convictions for violating section 422 and section 243, subdivision (e), (battery) involved domestic violence. The trial court revised its prior ruling and determined that Luis could be impeached with a 2014 misdemeanor conviction of violating Vehicle Code section 10851, a 2013 misdemeanor conviction of violating section 484 (theft), a 2005 felony conviction of violating section Health and Safety Code section 11378, and a 1999 felony conviction of violating Vehicle Code section 10851.

Subsequently during trial, the trial court ruled that if the defense elected to elicit defendant's statement to Deputy Tolbertson, which had been ruled admissible under Evidence Code section 356, the prior convictions admissible to impeach defendant if he testified would be admissible to impeach defendant as the declarant of the hearsay statement.

2. *Analysis*

Defendant argues that his prior convictions that were ruled admissible to impeach him should have been excluded or sanitized and that the trial court's failure to do so violated Evidence Code section 352, his Fourteenth Amendment right to due process, and his Sixth Amendment Right to present a defense. He asserts that his prior convictions of attempted murder and making a criminal threat were remote in time and did not directly relate to his honesty or veracity. While defendant does not assert that any of his prior convictions that were ruled admissible was not a crime of moral turpitude, he

nevertheless argues that those convictions had "little probative value." He further contends that there was a "high probability" that the jury would misuse the evidence of the two prior felony convictions because "attempted murder is a crime of violence" similar to the charged assault and his prior conviction for making criminal threats was the same crime for which he was being prosecuted.

"After the 1982 adoption of article I, section 28, subdivision (f), [now (f)(4)] of the California Constitution, a witness may be impeached with any prior felony conviction involving moral turpitude, subject to the trial court's discretion under Evidence Code section 352 to exclude it if it finds its prejudicial effect substantially outweighs its probative value. (*People v. Clair* (1992) 2 Cal.4th 629, 653-654.) The court's ruling is reviewed for abuse of discretion. (*Id*. at p. 655.) Because this discretion is broad, 'a reviewing court ordinarily will uphold the trial court's exercise of discretion.' (*People v. Clark* (2011) 52 Cal.4th 856, 932.)" (*People v. Anderson* (2018) 5 Cal.5th 372, 407 (*Anderson*).)

Similarly, the prosecution may properly seek to impeach the out-of-court statement of a nontestifying defendant with a prior conviction if the statement is admitted into evidence, subject to the trial court's discretion under Evidence Code section 352 to exclude evidence of the prior conviction if it finds its prejudicial effect substantially outweighs its probative value. (See *People v. Little* (2012) 206 Cal.App.4th 1364, 1374-1376; *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1452-1453; see also Evid. Code, § 1202 [allowing impeachment of hearsay statements with evidence that would have been admissible had the declarant testified at trial].) "A trial court's decision to admit or exclude impeachment evidence under Evidence Code section 352 is reviewed for an abuse of discretion. [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 766.)

"Any '[m]isconduct involving moral turpitude may suggest a willingness to lie . . . .' [Citation.]" (*Anderson*, *supra*, 5 Cal.5th at p. 408.) "[A] person who has committed a crime which involves moral turpitude other than dishonesty is more likely to

be dishonest than a witness about whom no such thing is known." (*People v. Castro* (1985) 38 Cal.3d 301, 315, fn. omitted (*Castro*).) A conviction of attempted murder denotes moral turpitude. (*People v. Hinton*, (2006) 37 Cal.4th 839, 888.) "Threatening to kill or seriously injure someone (§ 422) is also conduct involving moral turpitude. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 424.)" (*People v. Hall* (2018) 23 Cal.App.5th 576, 589.) A felony conviction for violating section 594 (vandalism) has been held to be a crime of moral turpitude (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1492-1495), and defendant does not contend that his 2011 misdemeanor conviction of vandalism was not a crime of moral turpitude.

"[A] series of crimes may be more probative of credibility than a single crime. [Citations.] ' "[W]hether or not more than one prior felony should be admitted is simply one of the factors which must be weighed against the danger of prejudice. [Citation.]" ' [Citation.]" (*People v. Clark, supra*, 52 Cal.4th at pp. 932-933 (*Clark*).) "[E]vidence of misconduct not amounting to a felony is less probative of immoral character than is a prior felony conviction. [Citation.]" (*Id*. at p. 933.) " 'Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.' [Citation.]" (*Anderson, supra*, 5 Cal.5th at p. 408.) Defendant has not established that the prior convictions ruled admissible had little or no probative value.

"[D]ifferent felonies have different degrees of probative value on the issue of credibility. Some, such as perjury, are intimately connected with that issue; others, such as robbery and burglary, are somewhat less relevant." (*People v. Rollo* (1977) 20 Cal.3d 109, 118 (*Rollo*), superseded on another point by constitutional amendment as indicated in *Castro, supra*, 38 Cal.3d at pp. 307-309, 312.) A "conviction of a crime involving dishonesty is more probative of veracity than . . . a crime of violence. [Citation.]" (*People v. Burns* (1987) 189 Cal.App.3d 734, 738 (*Burns*); see *Castro, supra*, 38 Cal.3d at p. 315.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Clark*, *supra*, 52 Cal.4th at p. 931.) "Although the similarity between the prior convictions and the charged offenses is a factor for the court to consider when balancing probative value against prejudice, it is not dispositive. [Citation.]" (*Id*. at p. 932.)

" 'While before passage of Proposition 8[, which added article I, section 28, to the California Constitution], past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible.' [Citations.]" (*Hinton, supra,* 37 Cal.4th at p. 888.) In *Hinton*, the defendant, who was charged with and convicted of several murders (*id*. at pp. 847-848), argued that his prior convictions of murder, attempted murder, and assault with a firearm should "have been excluded as too similar to the charged crime[s]." (*Id*. at p. 888.) The California Supreme Court concluded that "[i]nasmuch as defendant had no other prior felony convictions available for impeachment, the trial court did not abuse its discretion in admitting these crimes of violence. [Citation.] To do otherwise would have given defendant a ' "false aura of veracity." ' [Citations.]" (*Ibid*.)

In this case, the trial court considered completely different sets of prior convictions for purposes of impeaching Luis and for purposes of impeaching defendant. The court ruled that the defense could impeach Luis with two felonies and two misdemeanors. It ruled that the prosecution could impeach defendant with two felonies and one misdemeanor. Ultimately, the court did not sanitize any of the prior convictions that were ruled admissible for impeachment.

Apparently, defendant had no prior convictions of nonviolent and dissimilar felonies available for impeachment. His two prior felony convictions for aggravated

assault that were ruled inadmissible by the court were even more remote in time than those convictions ruled admissible and were like the charged assault. Luis's theft offenses were clearly relevant for impeachment as crimes involving dishonesty. (See *People v. Gurule* (2002) 28 Cal.4th 557, 608 ["theft crimes necessarily involve an element of deceit" and are probative for impeachment]; *People v. Zataray* (1985) 173 Cal.App.3d 390, 399 [a violation of Vehicle Code section 10851 was admissible for impeachment purposes as a crime involving dishonesty].) Luis's convictions of crimes involving dishonesty were more probative on the issue of credibility than his convictions of crimes of violence. (See *Burns, supra*, 189 Cal.App.3d at p. 738.)

Defendant has not convinced us that the trial court abused its broad discretion in deciding which and how many of his prior convictions would be admissible for impeachment if he testified or introduced his out-of-court statement of intent to defend himself. The complete exclusion of defendant's prior felony convictions would have clothed him with a false aura of veracity. Neither has defendant shown that the court's refusal to "sanitize" his convictions constituted an abuse of discretion. Sanitizing a prior conviction by not "disclosing its nature forestalls any *direct* prejudice" and "removes one risk of harm" but "create[s] a number of others equally grave." (*Rollo, supra,* 20 Cal.3d at p. 119.) If the nature of the offense is not specified, some jurors "may speculate that the conviction involved some form of unspeakable conduct, such as torture murder, gang rape, or child molestation," or "that the conviction was for an offense especially damaging to the defendant's credibility . . . ." (*Ibid*.)

Defendant further "submits [that] the court's rulings permitting the jury to hear of [his] prior convictions [if he testified or introduced his hearsay statement of his intent to defend himself,] while at the same time excluding [Luis's] more recent convictions for assault with intent to commit rape and criminal threats[,] rendered the trial fundamentally unfair in violation of [his] Fourteenth Amendment rights" and his constitutional right to

present a complete defense. He directs us to the discussion of Luis's prior convictions on the record before the trial court ruled on their admissibility for impeachment.[7]

Defendant's grievance, insofar as we can discern it, seems to be that although both Luis and he had prior convictions for violent acts and making criminal threats and the trial involved a "credibility contest," the trial court ruled admissible only his criminal convictions of such crimes. Given the arrays of convictions that were available for impeachment, the foregoing circumstance did not render the trial court's rulings an abuse of discretion or a denial of constitutional rights. If defense counsel was concerned that the jury might improperly consider defendant's prior convictions as evidence of his propensity to commit the charged crimes instead of considering them only for purposes of evaluating his credibility (see Evid. Code, § 1101, subds. (a) & (c)), defense counsel could have requested a limiting instruction. (See Evid. Code, § 355; cf. CALCRIM No. 375.)

Defendant has not demonstrated that the trial court's rulings on the admissibility of his prior convictions or sanitizing those convictions constituted an abuse of discretion or "unfairly support[ed] one side" in violation of defendant's constitutional right to due process or a fair trial.

C. *Cumulative Prejudice*

Defendant contends that the cumulative effect of the court's allegedly erroneous rulings resulted in a violation of his federal constitutional right to due process and a fair trial. Defendant acknowledges that defense counsel decided against introducing even the single statement of his intent to defend himself, which the trial court had ruled

[7] Defendant also refers us to Luis's admissions during the preliminary hearing, including the admissions of a 2013 conviction for making a criminal threat and a 1999 conviction of assault with intent to commit rape. The appellate record does not show that the preliminary hearing transcript was presented to or considered by the trial court in deciding which of Luis's prior convictions were admissible for impeachment.

admissible. But he suggests that his counsel's calculus might have been different if the court had ruled all three of his proffered hearsay statements admissible.

The fact that defendant had to choose whether to introduce his statement of intent to defend himself and risk impeachment with several prior convictions or forgo that evidence was a decision that was difficult, but not fundamentally unfair. " 'The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. [Citation.] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.' [Citation.]" (*Fuiava, supra*, 53 Cal.4th at p. 698, fn. omitted.)

We have found no prejudicial error. No cumulative prejudice warrants reversal of the judgment.

D. *Amendment of Section 1385*

Defendant argues that the recent amendment of section 1385 in 2018 retroactively applies to him under *Estrada*'s rule of retroactivity and that the matter should be remanded to allow the trial court to exercise its discretion with respect to the five-year enhancements (§ 667, subd. (a)). The People do not dispute that *Estrada* applies, but they assert that a remand for resentencing is unnecessary. They argue that the record clearly indicates that trial court would not have stricken the five-year enhancements in any event and point to the trial court's denial of defendant's *Romero* motion (see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), which sought the dismissal of his three prior strike convictions to avoid sentencing under the Three Strikes law.

1. *Governing Law*

When the crimes were committed in 2014 and at the time of sentencing, before the recent amendment of section 1385, subdivision (b) of that section precluded a judge from "strik[ing] any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667." (Stats. 2014, ch. 137, § 1, p. 2111; Stats. 2000, ch. 689,

§ 3, p. 4559.) Also, former section 667, subdivision (a)(1), stated: "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 2, p. 105.)

Effective January 1, 2019 (see Stats. 2018, ch. 1013, § 2; Gov. Code, § 9600, subd. (a)), section 1385 was amended to delete the provision prohibiting a judge from striking a prior serious felony conviction. Thus, section 1385 now permits a judge "in furtherance of justice" to exercise its discretion to strike or dismiss a five-year enhancement for a prior serious felony conviction. Section 667, subdivision (a), also was amended to omit its reference to section 1385, subdivision (b). (See Stats. 2018, ch. 1013, § 1.)

Under *In re Estrada*, "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted (*Brown*); see *People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).) "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*Conley*, *supra*, at p. 657; see *Estrada*, *supra*, 63 Cal.2d at p. 745.) "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.

[Citations.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5 (*Nasalga*) (plur. opn. of Werdegar, J.); accord, *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

Estrada's reasoning and presumption of retroactivity also may apply where statutory changes ameliorate the *possible* punishment for a class of persons or particular crime. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303-304 [Proposition 57's requirement of a juvenile transfer hearing before a juvenile may be tried as an adult and its elimination of direct filing in adult court apply retroactively]; *People v. Francis* (1969) 71 Cal.2d 66, 70, 75 (*Francis*) [possession of marijuana made a wobbler rather than a straight felony].) Here, the statutory changes create the possibility of lesser punishment for the class of persons who are convicted of a serious felony and were previously convicted of one or more serious felonies and give the sentencing judge "wider latitude in tailoring the sentence to fit the particular circumstances." (*Francis*, *supra*, at p. 76.)

The legislative history of these recent amendments indicate that they were meant to restore discretion with respect to imposition of five-year enhancements under section 667, subdivision (a), but it does not show that the California Legislature intended the amendments to have only prospective or limited retroactive effect. (See Sen. Rules Com., Off. Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018; Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as introduced on Feb. 16, 2018; Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018.) The legislative history indicates that the author of the bill amending section 1385 had asserted that the mandatory imposition of the enhancement was a "rigid and arbitrary system," which had "meted out punishments that [were] disproportionate to the offense" and did "not serve the interests of justice, public safety, or communities." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1393

(2017-2018 Reg. Sess.) as introduced on Feb. 16, 2018; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018.) The history also discloses that a co-sponsor of the bill maintained that current law "inappropriately ties a judge's hands." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as amended May 9, 2018; Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1393 (2017-2018 Reg. Sess.) as introduced on Feb. 16, 2018.)

We agree with defendant that the most recent amendment of section 1385 should be retroactively applied to nonfinal judgments to the extent constitutionally permissible.

2. *A Remand is Required*

We agree that the trial court's reasons for denying defendant's *Romero* motion suggest that the trial court might have been disinclined to strike the five-year enhancements at sentencing if it had had the discretion. But the record does not show that the court inevitably would not have exercised its discretion under section 1385, if it had had it, to strike or dismiss one or more of the five-year enhancements.

The trial court's analysis of defendant's *Romero* motion was properly aimed at determining only whether defendant fell outside the spirit of the Three Strikes law. In deciding "whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, 17 Cal.4th at p. 161.)

The trial court sentenced defendant to two concurrent prison terms of 25 years to life under the Three Strikes law. Under the unavoidable mandate of former sections 667, subdivision (a), and 1385, subdivision (b), the trial court also imposed a determinate ten-year term (two consecutive five-year enhancements) pursuant to section 667, subdivision (a), as to each count. The trial court never stated that the crimes were so heinous that it would maximize defendant's sentence to the full extent of the law or that it would have imposed the five-year enhancement terms even if it had the discretion under the law not to do so. (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*) ["a remand is required [under the newly amended section 12022.53] unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 ["Reconsideration of sentencing is required under *Romero* where the trial court believed it did not have discretion to strike a [T]hree [S]trikes prior conviction [under section 1385], unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].)

The People have not asserted that there is no basis for an exercise of discretion under section 1385. Defendant's *Romero* motion indicated that he has some serious mental health problems. It also indicated that his prior strike convictions were fairly remote in time, and two of those strike convictions were also the prior serious felony convictions. Defendant has already received an indeterminate life sentence for the current crimes under the Three Strikes law. "The concept of discretion implies that, at least in some cases, a decision may properly go either way. [Citation.]" (*In re Large* (2007) 41 Cal.4th 538, 553.)

The court must be accorded an opportunity to exercise its discretion under the current section 1385 to strike one or more of the five-year enhancements imposed pursuant to section 667, subdivision (a). (Cf. *McDaniels*, *supra*, 22 Cal.App.5th at

pp. 427-428 [matter remanded where section 12022.53 as amended permitted trial court to strike or dismiss a firearm enhancement in the interest of justice pursuant to section 1385 and "record contain[ed] no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements"]; cf. also *People v. Chavez* (2018) 22 Cal.App.5th 663, 713-714 [same].)

DISPOSITION

The judgment is reversed for the limited purpose of permitting the trial court, upon remand, to decide whether to strike or dismiss any prior serious felony enhancement (§ 667, subd. (a)) under section 1385 and resentence defendant accordingly.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

_____

GROVER, J.

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